Majlis Peguam Malaysia v Krishnasamy a/l Bhaktavatsalu

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-632–03 OF 2018
MARY LIM, SURAYA OTHMAN AND LEE SWEE SENG JJCA
7 MARCH 2020

Legal Profession — Professional discipline — Restoration of name to Roll of Advocates and Solicitors — Respondent suspended and struck off Roll of Advocates and Solicitors by disciplinary board — Respondent applied for restoration to Roll of Advocates and Solicitors — High Court allowed application — Whether there was substantial lapse of time from suspension and subsequent striking off of respondent from Roll — Whether respondent had borne fruits of repentance in rehabilitating himself that was worthy of restoration to Roll — Whether objections raised by Bar Council were of such grave concerns as to bar his application for restoration to Roll — Legal Profession Act 1976 s 107

The applicant ('respondent') was once a member of the Malaysian Bar. He was struck off the Roll of Advocates and Solicitors of the High Court of Malaya in 2005. After some lapse of 25 years since the respondent was suspended in 1989 and about 12 years after he was struck off the Roll, he applied to be restored to the Roll of the profession again. Before the High Court the respondent was able to persuade the learned judge that he had satisfied the test of 'fairness and reasonable' as prescribed by s 107 of the Legal Profession Act 1976. The complaint against him by the son of a client over the non-receipt of RM16,000 arising out of a settlement on a running down claim was not pursued further and neither the client nor the son who had complained to the Disciplinary Board ('DB'), turned up for the inquiry before the Investigating Tribunal and the Disciplinary Committee ('DC'). The High Court was persuaded that in all probabilities the RM16,000 would have been paid in full as confirmed in writing by a staff of a firm to the best of his recollection. The respondent had supported his application by setting out what he had done to rehabilitate himself. The learned High Court judge who allowed his application for restoration to the Roll of Advocates and Solicitors was satisfied that a lapse of some 12 years since he was struck off the Roll and some 25 years after being suspended was sufficient punishment for the grave misconduct of not being able to make payment to his client of the settlement sum from the insurance company but instead had to do so by instalment payments. The Bar Council who had intervened in the proceedings before the DB had obtained an order for the respondent to be struck off the Roll and being dissatisfied with the decision of the High Court for the respondent's restoration, had appealed to this court. The issues for consideration were: (a) whether there had been a substantial lapse of time from the suspension and subsequent striking off of the

respondent from the Roll taking the whole circumstances of the case into consideration; (b) whether the respondent had borne fruits of repentance in rehabilitating himself that was worthy of restoration to the Roll of Advocates and Solicitors; and (c) whether the objections raised by the Bar Council were of such grave concerns as to bar his application for restoration to the Roll.

Held, dismissing the appeal:

(1) The respondent was totally unaware of the various proceedings and so was absent from making representations and was not physically present to answer the charge against him. He had moved to the UK and then later to Singapore and was only aware of the striking off order some time in 2011. He continued to stay away from the profession and only made this application to the High Court for restoration back into the Roll of Advocates and Solicitors on 22 June 2017. As at the date of hearing of this appeal he had stayed away from law practice for some 30 years and the lapse of close to 15 years from the defining moment when he was struck off the Roll. A significant and substantial time had passed for a careful consideration as to whether the respondent should be restored to the Roll. The passage of time that had passed, though passive it may be, had to be taken into account as part of the punishment that he had suffered and the price he had paid in the atonement for his misconduct and shortcomings. During this period of abstinence from practice of the law, the respondent had stayed free from any infraction of the law and had generally earned his keep the decent way (see paras 39–43).

(2) The respondent had made restitution for his failure to pay the debt of RM16,000 to his client which was the subject matter of the complaint against him for which he was struck off the Roll. To the best of his recollection the respondent said that he had settled the debt of RM16,000 to his client though he did not have the full documents with him other than the relevant letters exhibited with the various cheques asking for an instalment of RM1,000 per month commencing 5 October 1990 in his letter to his client. The client would in all probability had been paid in full as otherwise there were no good reasons why she and her son, the complainant, absented themselves from the tribunal and the DC's hearings. The DC set up was similarly faced with the unenviable task of investigating the complaint in the absence of the complainant and the client as well as the respondent. The respondent had tried to contact the client at the last known address but to no avail. The absence of the complainant and his mother, the client, at both the tribunal and the DC hearings, would in all probabilities, suggested that the payment of the amount owing said to be RM16,000 would have been made (see paras 75–77 & 79–80).

(3) There was nothing wrong for the High Court to have considered the lapse of some 25 years since the respondent's suspension or some 12 years since being struck off the Roll. Even the shorter period of 12 years was significant a period for repentance to do its disciplining and purifying work in purging the respondent of any proclivity towards the perverse. As the period here was some 12 years from the date the respondent was struck off, there was only a complaint without the complainant or client present to pursue the complaint, the respondent did not appeal but accepted his lot thus saving the courts its precious time, and there was no criminal charge preferred nor conviction handed down and much less a prison sentence served and the respondent was now 70 years old. The law required that the respondent be furnished with the details of the complaints and be given an opportunity to answer the allegations made. If for some reason the complaints were not pursued further by the DB, then surely the respondent could not be faulted after more than 25 years from the last complaint in 1992 to now being unable to reply to complaints which he was not aware of and for which the Bar Council itself could not furnish information. The Bar Council further in its report confirmed that the respondent had not been subjected to other complaints or acts unbecoming since the date he was struck off the Roll. The respondent should be given a second chance (see paras 86, 102, 108–109 & 117).

[Bahasa Malaysia summary

Pemohon ('responden') pernah menjadi anggota Badan Peguam Malaysia. Dia dilucutkan daripada Daftarai Peguambela dan Peguamcara Mahkamah Tinggi di Malaya pada tahun 2005. Setelah tamat 25 tahun sejak responden digantung pada tahun 1989 dan kira-kira 12 tahun setelah dia dilucutkan daripada Daftarai, dia memohon untuk dikembalikan ke Daftarai kembali. Di hadapan Mahkamah Tinggi, responden dapat meyakinkan hakim yang bijaksana bahawa dia telah memenuhi ujian 'patut dan munasabah' seperti yang ditetapkan oleh s 107 Akta Profesion Undang-Undang 1976. Aduan terhadapnya oleh anak lelaki klien kerana tidak menerima RM16,000 yang timbul daripada penyelesaian tuntutan pelanggaran tidak diselesaikan lebih lanjut dan klien atau anak lelaki yang telah mengadu kepada Lembaga Tatatertib ('LT'), hadir untuk siasatan di hadapan Tribunal Siasatan dan Jawatankuasa Tatatertib ('JT'). Mahkamah Tinggi diyakinkan bahawa kemungkinan besar RM16,000 telah dibayar sepenuhnya seperti yang telah disahkan secara bertulis oleh kakitangan sebuah firma sepanjang ingatannya. Responden telah menyokong permohonannya dengan menyatakan apa yang telah dilakukannya untuk memperbaiki dirinya. Hakim Mahkamah Tinggi yang bijaksana yang membenarkan permohonannya untuk dikembalikan kepada Daftarai peguambela dan peguamcara berpuas hati bahawa tamat kira-kira 12 tahun sejak dia dilucutkan daripada Daftarai dan sekitar 25 tahun setelah digantung adalah hukuman yang cukup untuk kesalahan besar kerana

tidak dapat membuat pembayaran kepada kliennya jumlah pembayaran daripada syarikat insurans tetapi sebaliknya harus melakukan pembayaran ansuran. Majlis Peguam yang telah campur tangan dalam prosiding di hadapan LT memperoleh perintah agar responden dilucutkan daripada Daftarai dan tidak berpuas hati dengan keputusan Mahkamah Tinggi untuk pengembalian responden, telah merayu ke mahkamah ini. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat selang waktu yang besar dari penggantungan dan pelucutan seterusnya responden daripada Daftarai dengan mempertimbangkan keseluruhan keadaan kes tersebut; (b) sama ada responden telah menyesal dalam memperbaiki dirinya untuk layak dikembalikan kepada Daftarai Peguambela dan Peguamcara; dan (c) sama ada bantahan yang dikemukakan oleh Majlis Peguam kebimbangan serius untuk menghalang permohonannya untuk dikembalikan kepada Daftarai.

Diputuskan, menolak rayuan:

(1) Responden sama sekali tidak menyedari pelbagai prosiding tersebut dan oleh itu tidak hadir untuk membuat perwakilan dan tidak hadir secara fizikal untuk menjawab tuduhan terhadapnya. Dia telah berpindah ke UK dan kemudian ke Singapura dan baru mengetahui tentang perintah pelucutan tersebut pada tahun 2011. Dia terus menjauhkan diri dari profesion dan hanya membuat permohonan ini ke Mahkamah Tinggi untuk pengembalian kepada Daftarai peguambela dan peguamcara pada 22 Jun 2017. Pada tarikh pendengaran rayuan ini, dia telah menjauhkan diri daripada amalan undang-undang selama kira-kira 30 tahun dan hampir 15 tahun dari saat yang ketika dia dilucutkan daripada Daftarai. Masa penting dan besar telah berlalu untuk pertimbangan yang teliti sama ada responden harus dikembalikan kepada Daftarai. Peredaran masa yang berlalu, walaupun pasif, harus dipertimbangkan sebagai sebahagian daripada hukuman yang ditanggungnya dan harga yang telah dia bayar sebagai penebusan atas kesalahan dan kegagalannya. Dalam tempoh penjauhan daripada amalan undang-undang ini, responden telah bebas dari pelanggaran undang-undang dan secara amnya telah bekerja dengan cara yang baik (lihat perenggan 39–43).

(2) Responden telah membuat pemulihan kerana kegagalannya membayar hutang sebanyak RM16,000 kepada kliennya yang menjadi perkara pokok aduan terhadapnya yang mana dia dilucutkan daripada Daftarai. Sepanjang ingatannya, responden mengatakan bahawa dia telah melunaskan hutang sebanyak RM16,000 kepada pelanggannya walaupun dia tidak mempunyai dokumen lengkap dengannya selain daripada surat-surat yang berkaitan yang ditunjukkan dengan pelbagai cek yang meminta ansuran sebanyak RM1,000 sebulan bermula 5 Oktober 1990 dalam suratnya kepada kliennya. Klien kemungkinan besar telah dibayar sepenuhnya kerana jika tidak, tidak ada alasan yang baik mengapa dia dan anaknya, iaitu pengadu, tidak hadir ke mahkamah

dan pendengaran JT. Penubuhan JT juga berhadapan dengan tugas sukar untuk menyiasat aduan sekiranya tidak ada pengadu dan klien serta responden. Responden telah cuba menghubungi klien di alamat terakhir yang diketahui tetapi tidak berjaya. Ketiadaan pengadu dan ibunya, iaitu klien, di kedua-dua tribunal dan pendengaran JT, berkemungkinan besar, menunjukkan bahawa pembayaran jumlah yang terhutang dikatakan RM16,000 telah dilakukan (lihat perenggan 75–77 & 79–80).

(3) Tiada kesalahan bagi Mahkamah Tinggi untuk mempertimbangkan tamat 25 tahun sejak penggantungan responden atau sekitar 12 tahun sejak dilucutkan daaripada Daftarai. Bahkan jangka masa lebih pendek daripada 12 tahun adalah tempoh bermakna bagi bertaubat untuk melakukan tindakan mendisiplinkan dan memurnikannya dalam membersihkan responden daripada segala kecenderungan terhadap kesalahan. Oleh kerana tempoh di sini adalah sekitar 12 tahun dari tarikh responden dilucutkan, hanya terdapat satu aduan tanpa pengadu atau klien hadir untuk meneruskan aduan tersebut, responden tidak mengemukakan rayuan tetapi menerimanya sehingga dapat menjimatkan masa yang sangat berharga bagi mahkamah, dan tidak ada tuduhan jenayah yang dikemukakan atau tidak dijatuhkan sabitan dan lebih-lebih lagi hukuman penjara dijatuhkan dan responden sekarang berusia 70 tahun. Undang-undang memerlukan responden dilengkapi dengan perincian aduan dan diberi kesempatan untuk menjawab tuduhan yang dibuat. Sekiranya atas sebab-sebab tertentu, aduan tersebut tidak dilanjutkan oleh LT, sudah pasti responden tidak dapat disalahkan setelah lebih dari 25 tahun daripada aduan terakhir pada tahun 1992 hingga sekarang tidak dapat membalas aduan yang dia tidak sedar dan Majlis Peguam sendiri tidak dapat memberikan maklumat. Majlis Peguam selanjutnya dalam laporannya mengesahkan bahawa responden tidak tertakluk kepada aduan atau tindakan lain sejak tarikh dia dillucutkan daripada Daftarai. Responden harus diberi peluang kedua (lihat perenggan 86, 102, 108–109 & 117).]

Cases referred to

Awtar Singh a/l Puran Singh v Majlis Peguam Malaysia [2013] 1 MLJ 817, HC (refd)

Chan Chow Wang v Malaysian Bar [1986] 2 MLJ 159; [1986] 1 LNS 94 (refd)

Charan Jit Singh a/l Santokh Singh v Majlis Peguam Malaysia & Anor [2013] 9 MLJ 400, HC (refd)

Kalpanath Singh s/o Ram Raj Singh v Law Society of Singapore [2009] 4 SLR 1018, HC (refd)

Lim Cheng Peng, Re [1988] 1 MLJ 231 (refd)

Majlis Peguam Malaysia v Ahmad Rushdi bin Omar [2017] 6 MLJ 70; [2017] 9 CLJ 413, CA (refd)

Majlis Peguam Malaysia v Lim Yin Yin [2018] MLJU 986, CA (refd)

A *PP v Wong Kim Fatt* [1991] 3 CLJ 2188, HC (refd)
Teoh Hooi Leong v Bar Council, Malaysia [1991] 2 MLJ 190, SC (refd)
Thavananthan a/l Balasubramaniam v Majlis Peguam Negara [2010] 3 MLJ 316, FC (refd)

B **Legislation referred to**

Legal Profession Act 1976 ss 15(3)(b), 88, 88A, 88A(a), (b), (c), (d), (e), 107, 107(1), (3), (5)
Penal Code ss 182, 408, 409
Prevention of Corruption Act 1961 (repealed by the Anti-Corruption Act
C 1997) s 4(a)

Farez Jinnah (Farez Jinnah) for the appellant.
M Monoharan (M Manoharan & Co) for the respondent.

D **Lee Swee Seng JCA (delivering judgment of the court):**

[1] Trust once broken is difficult to be restored. It is expected of and exacted from all professionals but no profession is more exposed to the temptations of a breach of trust than the legal profession, for in its members is reposed not just
E confidences but cash.

[2] Whilst competence in the law can be acquired through study and practice, moral fibre and character are assumed to be possessed by a lawyer until it is found wanting. Doubtless by that time the client would have suffered.
F Understandably the Bar Council is concerned that its members who have breached the trust reposed in them especially, when it comes to client's money, must be severely dealt with by no less than a disbarment from practice.

INTRODUCTION

G

[3] The respondent in this case, who was the applicant before the High Court, was once a member of the Malaysian Bar. He was struck off the Roll of Advocates and Solicitors of the High Court of Malaya in 2005. After some lapse of 25 years since the respondent was suspended in 1989 and about 12
H years after he was struck off the Roll, he applied to be restored to the Roll of the honourable profession again.

IN THE HIGH COURT

I **[4]** Before the High Court the applicant was able to persuade the learned judge that he had satisfied the test of 'fairness and reasonable' as prescribed by s 107 of the Legal Profession Act 1976 ('the LPA') and as supported by case law. The complaint against him by the son of a client over the non-receipt of RM16,000 arising out of a settlement on a running down claim was not

pursued further and indeed, neither the client nor the son who had complained to the Disciplinary Board, turned up for the inquiry before the Investigating Tribunal and the Disciplinary Committee.

[5] The High Court was persuaded that in all probabilities the RM16,000 would have been paid in full as confirmed in writing by a staff of the firm to the best of his recollection. As more than 25 years had passed since the respondent was suspended and some 12 years since he was struck off, it was understandable that he no longer had any documents to prove payment. He also had not been able to contact the client to corroborate his payment.

[6] He had nevertheless supported his application setting out what he had done to rehabilitate himself during the years in the wilderness so to speak. He taught law in Singapore as a way of supporting himself and providing for the family. He went to London thereafter to pursue a Master of Laws from Queen Mary College under the University of London programme and also taught law part time and later full time. Upon his return he was involved in his church outreach work to the poor and marginalised in the Philippines; and various persons, including his pastor and a senior member of the Bar who had known him for years, who could vouch for his commitment to work and constancy of purpose had given their testimonials of his changed life.

[7] The learned High Court judge who allowed his application for restoration to the Roll of Advocates and Solicitors was satisfied that a lapse of some 12 years since he was struck off the Roll and some 25 years after being suspended was sufficient punishment for the grave misconduct of not being able to make payment to his client of the settlement sum from the insurance company but instead had to do so by instalment payments.

[8] The Bar Council who had intervened in the proceedings before the Disciplinary Board had obtained an order for the applicant to be struck off the Roll and being dissatisfied with the decision of the High Court for the respondent's restoration, had appealed to this court.

ISSUES

[9] The question is whether it is fair and reasonable for the applicant to be so restored to the Roll for practice as an advocate and solicitor of the High Court of Malaya in an application made by way of an originating motion under s 107 of the LPA.

[10] The words used in s 107(1) of the LPA reflecting the test that the High Court should apply before the restoration order is made are as follows:

> The High Court may, if it thinks *fair and reasonable*, at any time order the Registrar

A to restore to the Roll the name of an advocate and solicitor which has been removed from or struck off, the Roll. (Emphasis added.)

[11] The fact that there is such a provision for restoration after having been struck off would suggest that in deserving cases where the lawyer has been fully rehabilitated, bearing fruits of repentance and making full restitution, he should be extended grace and be given a second chance. Indeed striking off the Roll is not permanent and where it can be shown that it is fair and reasonable, the advocate and solicitor concerned can apply for restoration, often after a lapse of a considerable time for remorse and regret as well as repentance and rehabilitation to take its course in the purging of the body, mind and spirit from the contamination of his grave misconduct.

[12] In *Teoh Hooi Leong v Bar Council, Malaysia* [1991] 2 MLJ 190 the applicant under a s 107 of the LPA application had previously been charged in 1974 for two counts of criminal breach of trust of $99,240 under s 409 of the Penal Code. He pleaded guilty and received a sentence of three months' imprisonment and a fine of $2,000. In 1975 he was made a bankrupt. In 1988 he obtained an order of discharge of his bankruptcy. In 1989 he applied for restoration to the Roll.

[13] At p 193, the Supreme Court in reversing the decision of the High Court in dismissing the appellant's application for restoration observed as follows:

> ... Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his name restored to the Roll. *The lapse of time since the conviction is thus a material consideration.* It is true that there should be strong disinclination to re-admit to the profession an advocate and solicitor who had been guilty of improper conduct ... (Emphasis added.)

[14] In *Teoh Hooi Leong* at p 192, the Supreme Court had endorsed the principles enumerated in the Singapore case of *Re Lim Cheng Peng* [1988] 1 MLJ 231 as follows:

> (1) The court may order restoration to the Roll the name of an advocate and solicitor, which had been removed from or struck off, the Roll if it thinks fit. However, this discretion must be exercised judicially.
>
> (2) The Legislature does not provide the time frame within which an applicant ought to apply for restoration after having been removed from the Roll and/or struck off the Roll. However, in arriving at its decision to restore the applicant to the Roll the lapse of time between the date of the order striking the solicitor off the Roll and the date of his application for restoration to the Roll is filed in court is a relevant consideration.

(3) The court must consider the view of the body entrusted by the Legislature for the proper management of the affairs and conduct of the profession.

[15] What then are the factors that should be taken into account bearing in mind always that whilst everyone should be allowed a second chance, the public needs to be protected against any relapse of trust to their detriment. Clearly each case must be decided on its own merits drawing always from the principles that may be teased from previous cases that have come before the courts.

[16] By 'fair' is meant not just fairness to the lawyer applying for restoration but also 'fairness' to the public, the profession and the court as a whole. The Supreme Court in *Teoh Hooi Leong*'s case at p 192 expounded on the different perspectives from which the criterion of 'fairness' may be judged:

> The word 'fair' must necessarily mean that the decision *must be fair firstly to the members of the public* with whom the applicant will be renewing professional relations once re-admitted because the law seems to protect not only the profession but also the public from errant lawyers.
>
> The decision must also be *fair to the profession* and to his colleagues in the profession. The appellant here produced several letters from senior members of the legal profession exhibited at pp 72–77. The Bar Council in its letter at p 79 of the appeal record stated that it would not object to the application. The Bar Council did not object to the application before the High Court and maintained the same stance in the appeal before this court. On 22 September 1989 in his report and statement of facts the President of the Malaysian Bar stated that the Council had no reason to doubt the appellant's declaration of remorse and repentance and had no reason to doubt the expressions of opinion as to the appellant's character and fitness for re-admission to the Roll.
>
> The word 'fair' also requires that the decision *must be fair to the court* itself because when re-admitted the appellant will be an officer of the court.
>
> Last but not least the decision *must be fair to the appellant*. True he was convicted under s 409 of the Penal Code and by all counts it is a serious offence especially to an advocate and solicitor. True the court must necessarily be disinclined to restore the name of an advocate and solicitor who had committed a misconduct and the onus of an applicant for admission under s 107 of the Act is a heavy one. But *the duty of the court is to look at the circumstances and all the materials available to satisfy itself that an applicant has repented and reformed and there is a strong likelihood that he is not going to repeat the misconduct.* (Emphasis added.)

[17] The Court of Appeal in *Majlis Peguam Malaysia v Ahmad Rushdi bin Omar* [2017] 6 MLJ 70; [2017] 9 CLJ 413 had applied the 'fair and reasonable' test in the context of the requirement of s 107 of the LPA.

[18] Thus the court hearing such an application must consider whether there has been a sufficient lapse of time during which period he has led a life

above reproach; reformed or perhaps even transformed his life for the better and made restitution for the wrongs for which he had been punished by being struck off the Roll.

[19] It is an amalgamation of factors that the court hearing the application would have to consider, having always in mind the particular and peculiar facts of each case and the reasons why the Bar Council is objecting to his application.

Whether there has been a substantial lapse of time from the suspension and subsequent striking off of the respondent from the Roll taking the whole circumstances of the case into consideration

[20] Time has a way of maturing all of us and more so when one has suffered ignominy and shame arising from one's misdeed or misconduct as was the case here where being struck off the Roll of Advocates and Solicitors is a permanent blot on one's reputation and justifiably so.

[21] The seriousness of the misconduct cannot be mitigated in anyway as in the first place a client should never have to wait for payment of his settlement sum by instalments. It can only mean that the solicitor concerned has dipped his hand, and a rather unclean one at that, into his client's account with the dire consequence that there is not sufficient money to pay the client concerned. In a criminal prosecution for a crime of this nature, the only place for mitigation perhaps at sentencing stage is if full restitution has been made.

[22] It is both shameful and scandalous and even though the complaint was not followed through with the complainant or his mother who is the client here, being physically present to pursue the complaint, the uncontradicted evidence is that there was not enough money in the client's account to pay what was due to his client.

[23] The fact that the client or complainant did not pursue the matter further in the disciplinary hearings does not make the misconduct any less serious. Even in a case where the complainant has withdrawn the complaint but where the misconduct complained of is with respect to client's money not released to client, the Court of Appeal held in *Majlis Peguam Malaysia v Lim Yin Yin* [2018] MLJU 986 that the decision of the Disciplinary Board in striking the lawyer concerned off the Roll was justified. On appeal the Federal Court affirmed the decision of the Court of Appeal.

[24] The Bar Council was right to intervene and to pursue with the complaint even when the client was no longer interested as the Bar Council has a broader duty to safeguard the interests of the general public against any possible consequences of the lawyer's lapse of moral judgment.

[25] The Disciplinary Board disagreed with the decision of the Disciplinary Committee that since neither the complainant nor the client was present, the misconduct was not proved. The Disciplinary Board on 15 February 2005 imposed the maximum punishment under the law which was to strike off the respondent from the Roll of Advocates and Solicitors.

[26] There was no appeal by the respondent from that decision and his explanation was that he did not receive any notice of the hearing and furthermore by that time he had ceased practice since his suspension some 16 years ago.

[27] Here is a case where the applicant had been called and admitted as an advocate and solicitor of the High Court of Malaya on 28 September 1985 and had practised law as a sole-proprietor under the name of Messrs B Krishna & Partners. The record shows that he was last in possession of his *Sijil Annual* in 1989. After that he ceased practice and was suspended from practice via an order pursuant to s 88 of the LPA dated 4 December 1989. The respondent made no attempt to set aside the suspension order.

[28] Seven years later on 19 March 1997, a complaint was lodged with the Advocates and Solicitors Disciplinary Board by the son of the client. There was again another long lapse of time of some six years before an Investigating Tribunal was constituted on 14 January 2003 to investigate into the complaint.

[29] Neither the complainant nor the client, the complainant's mother, appeared before the Investigating Tribunal ('Tribunal') for the hearing on 12 June 2003. The respondent said he was absent because he was unaware of the hearing and that he did not respond to the letter issued by the tribunal asking for his response to the complaint as he did not receive the letters dated 31 January 2003 and 24 April 2003. He had moved to Singapore by then. Indeed the letter from the Chairman of the Tribunal and the notice of hearing sent to him by AR Registered Post were returned unclaimed.

[30] It behooves all lawyers who either have ceased practice or are suspended to keep the Bar Council posted as to their last known address so that they would be kept informed as to any dates fixed for any inquiry into any complaints by clients.

[31] It equally behooves on the Disciplinary Board that any complaint against an advocate and solicitor should be pursued promptly within the time-frame provided under the LPA so that no stale offences are pursued where complaining clients are no longer interested in pursuing their complaints and the solicitors affected might have long ceased practice and moved on in life. There is also the concomitant problem of locating old files and records which

A may not be kept for more than ten years. Here some six years had lapsed from the complaint before the tribunal was constituted and some 13 years after the suspension from practice of the respondent before the investigation got underway.

B **[32]** The tribunal nevertheless made its recommendation on 26 June 2003 to the Disciplinary Board that there should be a formal investigation into the complaint. From the record of complaint, the complaint was made by one Zainal bin Said against the respondent wherein the mother of the complainant, Hamsiah bt Mohamad had engaged the respondent to pursue a fatal accident C claim involving the complainant's brother, Samsudin bin Said.

[33] There was a purported settlement reached in 1989 where a settlement sum was paid to the respondent and as gleaned from a letter written by the respondent to the opposing solicitors dated 18 October 1986, a sum of D RM63,000 with costs was proposed at para A.4.2 at p 129 of RA(C). However, as commented by the tribunal in its report at p 129 of the RA(C) at para A.4.2, it is not clear from the record of complaint what was the amount paid on settlement of the client's claim.

E **[34]** Later there was another letter from the respondent dated 30 August 1990 proposing a settlement of a debt of RM16,000 by way of monthly instalments of RM1,000 starting from 5 October 1990. See para A.4.3 at p 129 and p 107 of RA(C).

F **[35]** The respondent had issued letters enclosing the cheques to the client but those cheques could not be cashed as can be seen at paras A.4.4 and A.4.5, at pp 129 and 94–103 of RA(C). The complainant claimed that the respondent had failed to pay the outstanding settlement sum to his mother, the client of the G respondent, after a lapse of some eight years. See para 1 at p 92 of RA(C).

[36] The respondent had failed to respond and provide an explanation and thus failed to account for the monies received for the benefit of his client. The Disciplinary Board then constituted a Disciplinary Committee ('DC') on H 15 October 2003 to investigate into the complaint.

[37] The DC was of the view that since both the client and respondent did not appear before them for the hearing fixed on 12 November 2003 and on 12 December 2003, there was nothing that could be investigated further nor I any finding of facts made beyond the letter of complaint of the client written by the client's son. It recommended on 9 August 2004 that the complaint be dismissed.

[38] The Disciplinary Board disagreed and was of the view that the

allegation of not having been paid the settlement sum in full is serious misconduct of misappropriation of client's money that was not contradicted or refuted by the respondent and that the only punishment reserved for such cases would be to strike off the Roll of Advocates and Solicitors which order was eventually made on 15 February 2005.

[39] The respondent said he was totally unaware of the various proceedings and so was absent from making representations and was not physically present to answer the charge against him.

[40] He had moved to the UK and then later to Singapore and was only aware of the striking off order some time in 2011.

[41] He continued to stay away from the profession and only made this application to the High Court for restoration back into the Roll of Advocates and Solicitors on 22 June 2017. The High Court allowed his application on 19 February 2018.

[42] As at the date of hearing of this appeal he had stayed away from law practice for some 30 years and the lapse of close to 15 years from the defining moment when he was struck off the Roll. We are of the considered view that a significant and substantial time had passed for a careful consideration as to whether the applicant should be restored to the Roll.

[43] The passage of time that had passed, though passive it may be, has to be taken into account as part of the punishment that he has suffered and the price he has paid in the atonement for his misconduct and shortcomings. During this period of abstinence from practice of the law, the respondent has stayed free from any infraction of the law and has generally earned his keep the decent way.

[44] Even in cases involving conviction for a crime, an advocate and solicitor may apply for restoration to the Roll after a substantial lapse of time. See the cases of *Thavananthan a/l Balasubramaniam v Majlis Peguam Negara* [2010] 3 MLJ 316 (FC) and *Teoh Hooi Leong v Bar Council, Malaysia*. The misconduct, serious as it is, does not bar a restoration to the Roll and to subsequent practice. This is implicit from the existence of s 107 of the LPA.

[45] Granted the lapse of time is not an automatic ticket for readmission as was cautioned in *Awtar Singh a/l Puran Singh v Majlis Peguam Malaysia* [2013] 1 MLJ 817 (HC) as follows:

> [17] The applicant submits that his name should be restored to the Roll based on the fact that he has been suspended for more than five years. I find that such a

A submission is without merit as it is clear from the case law that *the mere fact that the appellant was struck off for five years and more does not give rise to an automatic right to be reinstated although it may be a factor to be considered*: *Ram Kishan Re* [1992] 1 SLR 529. What is more important to be considered here is for the court to focus on the intrinsic character of the applicant that is to say, whether the applicant has B rehabilitated during the interim period ... (Emphasis added.)

[46] Whilst the passive passage of time with no criminal conviction for dishonesty is relevant, the court must next consider whether there was the purposeful pursuit of nobler tasks indicative of the rehabilitation that has C begun its work of restoration and renewal in his life; bearing fruits of repentance worthy of his being given a second chance.

Whether the respondent has borne fruits of repentance in rehabilitating himself that is worthy of restoration to the Roll of Advocates and Solicitors

D

[47] The onus is on the applicant to satisfy the court that he is a fit and proper person to have his name restored to the Roll. In *Chan Chow Wang v Malaysian Bar* [1986] 2 MLJ 159; [1986] 1 LNS 94, the court held that in the E public interest, the applicant making an application for restoration has to demonstrate to the court that he will not likely repeat these offences if he is re-admitted. The onus of proof is on the plaintiff to show that:

(a) there has been such a change in his character as to make him a fit and proper person to resume practice at the Bar;

F (b) he is truly penitent; and

(c) he has made restitution.

[48] The respondent, of course, had to earn a living by other means once he G was suspended from practice. In the 27 years since he was suspended from practice to the date of his application for restoration in 2017, he had tried his hands at various jobs and businesses to keep himself afloat, to provide for his family and to repay his debts.

H **[49]** The law does not stop him from pursuing other trades or profession or vocation and here the respondent had pursued predominantly a subject close to his heart which is law, though not in the practice of it but in the teaching of it.

[50] He had to eat humble pie and he did what he knew best next to the I practice of law; he taught law both part-time and full-time. He started as a law lecturer at Stamford College earning a meagre RM1,500 per month. Lecturing without a Masters degree had little prospects and so he furthered his knowledge of the law by taking the Masters in Law degree from Queen Mary College, University of London. He left for London in September 1991 for that purpose

with the help of financial contributions from friends and family members. He completed his Masters in Law in August 1992 while working as a part-time law lecturer to support himself.

[51] Later in 1993 he went to Singapore to do the same. In 2000 he set up a consultancy firm dealing in formation of company, immigration and manpower matters. He then went into full-time teaching at various institutions, teaching law subjects for the University of London LLB Degree programme.

[52] In 2010, he joined the Buxton School of Law and thereafter helped to set up an Institute of Paralegal Studies where he crafted a programme called the Certificate of Paralegal Studies as well as a Diploma in Paralegal Studies. Whilst he might have seen a market for the training of paralegals, unfortunately the Elite International College under which he was conducting the training ran into financial problems and was later closed down. See p 190 RA(C).

[53] As part of his contribution back to society, the respondent volunteered his services at the Singapore Indian Development Authority where he was involved in assisting lawyers in offering legal advice to the poor. In 1995, he was nominated the first President of the Singapore Cosmopolitan Club formed by the Singapore Ministry of Manpower and Contact Singapore. The Club functions with a grant from the Singaporean government with the aim of offering assistance to foreigners intending to make Singapore their home. Reference is made to the letter dated 2 November 2017 from one Mr Ting Kwai Meng at p 192 RA(C).

[54] Whatever it is, some 12 years have passed since the striking off and though that by itself may be insufficient, one must nevertheless look at what the person seeking restoration has been doing during this wilderness period.

[55] Perhaps it underscores the aphorism that those who love the law but do not like the rough and tumble of practice would often end up teaching the law; to that may be added that those who cannot practise the law for some reason would pursue a career in the academia. In any event such a career path does not normally expose one to the temptation of absconding with or abusing the trust in misusing clients' money.

[56] The fact that he pursued a Masters in Law would to some extent be indicative of his passion for the law. Granted passion must be directed towards the right path for that which is useful can also be abused through wrong use. His finding a separate calling in teaching the law and imparting knowledge of it to the aspiring law students is something commendable as part of his efforts in keeping abreast with the law should he later choose to return to it.

[57] Outside the law he had contributed, for the last five years before his application for restoration, towards helping the lot of the homeless children in the Philippines by raising funds for them through a 'Not for Profit and Social Enterprises' called 'LKM Enterprises'. The said LKM Enterprises had in a Letter of Appreciation addressed to the respondent dated 2 July 2017, signed by one Allan Carmen Cuanco who is a Coordinator for Branagh Pasig, Pasay City, highlighted the selfless commitment of the respondent towards their cause in outreach work towards the down and out as follows at p 191 RA(C):

> Special mention must be made of the contribution made by Mr Krishna Bhaktavatsalu in not only offering financial assistance but also personally taking charge of raising funds to assist us in our activities for these helpless children most of whom do not have parents or have been abandoned.
>
> Two of the homeless children, Aljade Cruz and Aaron Cruz are in the custody and care of Mr Krishna Bhaktavatsalu who has applied for student passes in Malaysia and also housed them with his family. God will bless him with a fruitful life for his sincerity and goodness.

[58] The Bar Council said little weight should be attached to a letter of this nature, dated after the application for restoration is filed and providing scant details as to what the organisation is.

[59] We take the view that in the absence of evidence to the contrary one might accept the testimonials for whatever they are worth for how else can one ask another to vouch for what one has done other than the recipient and the person having knowledge of it stating to the best he could and leaving it to others and the court to judge.

[60] After all it is in the nature of good deeds that one should not be blowing one's trumpets about it and as a wise teacher once remarked, when it comes to giving, we must not let our left hand know what our right hand is doing so that our giving may be in secret! Any reward would be in the hereafter.

[61] Such testimonials are furnished on a need to know basis for the eyes of those who need to know. It is no different from the requirement of 'two recent certificates as to his good character' required under s 15(3)(b) of the LPA for the petition for admission except that for a restoration application, the court would scrutinise it with greater strictness for the character here had been dented before by a serious misconduct justifying being struck off the Roll.

[62] The stricter scrutiny that the testimonials must be subject to in a case of a restoration application was singled out for mention by the Court of Appeal in *Majlis Peguam Malaysia v Ahmad Rushdi bin Omar* as follows:

[31] The only documents submitted to the court was the two purported 'certificates of good character'. The purported 'certificates of good character' did nothing to illustrate that the plaintiff had repented and or turned over a new leaf or that there has been such a change in his character as to make him a fit and proper person to resume practice at the Bar. The reasons offered by the plaintiff in his affidavits are not sufficient to justify the 'fair and reasonable test'. These are not valid reasons when compared to the public's and court's interest. The plaintiff has to show that public interest will be served by the restoration of the plaintiff.

[32] There were no testimonials of the plaintiff's character beyond the bare statement of good character. There was no elaboration or explanation as to why the plaintiff was said to be of good character for the purpose of the application for restoration. As the plaintiff had been struck off the Roll for grossly improper conduct, he must necessarily be subject to stricter scrutiny than that of a new entrant to the legal profession who has no adverse record. The court would expect more than a simple 'certificates of good character' (see *Awtar Singh Puran Singh v Majlis Peguam Malaysia* [2013] 1 MLJ 817; [2013] 3 CLJ 494).

[63] It is in this light that one must look at the testimonials exhibited. One is from a senior member of the Bar, Mr Balan Samy Nair who has been in practice for the past 31 years when he wrote the testimonial dated 2 May 2017. He stated that he has known the respondent for more than 40 years and that they were close friends, having met each other when they started work at the Lembaga Pelabuhan Kelang ('LPK'). They both took up law at the same time whilst in employment and attended night classes together.

[64] Besides confirming what the respondent had been doing since been struck off the Roll, he had also mentioned his publications on Singapore legal procedures both in civil and criminal law and that despite being away from the legal practice in Malaysia the respondent continued to show a keen interest in the development of the law here. He said of the respondent that he has always been remorseful and has fully repented and that taking into account his current age (67 then when the testimonial was written) he was confident that the respondent 'will not repeat the mistake ever again'.

[65] Though Mr Balan Samy Nair had inadvertently stated erroneously the year the respondent was struck off the Roll as 2002 when it was in 2005, we do not think that would in any way detract from what appears to be a fair assessment as to the respondent's character and conduct in his wilderness wanderings.

[66] Mr Muniappen Soyabalu who was the managing director of the Institute of Paralegal Studies in a letter dated 20 January 2014 had also vouched for his commitment and honesty in his work though fully aware of his being struck off the Roll. He wrote at pp 188–189 RA(C) as follows:

... He enjoys a high level of confidence and he has shown by his behaviour and

A commitment that he can be fully trusted ... we, the Management, have no doubt as (sic) his conduct and fitness to be a faculty member of this institution or for that matter any other profession or calling.

B **[67]** Mr Ting Kwai Meng wrote on 3 November 2017 at p 192 RA(C) of his having known the respondent since 1994 and of his teaching law at the Buxton School of Law in Singapore. He spoke of the respondent having volunteered with the Singapore Indian Development Association for which he was awarded a citation for three years for continuous service by the then Minister for Law for Singapore, Professor Jayakumar. He mentioned too of the respondent's role in C setting up the Cosmopolitan Club and that he was appointed the inaugural President by the then Minister for State (Home Affairs) Professor Ho Pan Kee who was the patron of the Club. Perhaps his closing observation is relevant:

D Whatever mistake he may have committed in the past, I can now state that he is a changed person. I can now attest that he is a man of integrity and sincerity. He is a person fit to be a member of the legal profession. I am confident that he will contribute to the development of the law.

E **[68]** He had also left behind his phone number for the purposes of further queries.

[69] The Bar Council had doubted even the publication of study manuals in law by Mr Ting Kwai Meng as an internet search could find no footprints of it, F suggesting that it could well be a bogus publication. We do not think that such an assertion is a fair one as study manuals of a college may not receive that wide a circulation as to be available on the internet search unlike law books published by reputable publishers.

G **[70]** In *Thavananthan a/l Balasubramaniam v Majlis Peguam Negara* the Federal Court took a practical approach in allowing an advocate and solicitor who had been convicted and served a prison sentence to be restored to the Roll and in doing so observed as follows:

H [15] Learned counsel for the respondent in his submission before us contended that the appellant had provided nothing convincing to indicate in writing or in the affidavit in support of his application that he is penitent or repentant or that he will in fact maintain the integrity and expected standards of the legal profession. To the respondent the appellant has not shown as yet that he is a fit and proper person. With respect on this point, I do not think that the appellant needs to go that far I categorically express in writing or in his affidavit that he is repentant and will maintain the integrity and the standards expected of him as a legal practitioner. *The fact that the appellant had filed his application to be restored to the Roll which was supported by the various letters of recommendation and testimonial by senior members of the Bar and the judiciary are more than sufficient to show the appellant is now fit and proper person.* (Emphasis added.)

[71] Unlike sample and simple testimonials and certificates of good character wherein the person giving it would just mouth or parrot the words prescribed, here the various persons had descended to some details to describe what the respondent had been doing.

[72] The respondent in his affidavit in support had set out his chequered career path in the pursuit of a professional qualification in law. He completed his Sijil Pelajaran Malaysia in 1967 and in 1970 he started work as a clerk in LPK with a monthly wage of RM132. In 1972 he finished his Sijil Tinggi Pelajaran as a part-time student. He worked hard to save for his further education overseas and in 1980 it was a dream come true for him when he was accepted by the University of Buckingham for an LLB degree for the academic year 1981–82. He sold his house and rented a house for his aged parents and paid the rental for the next two years in advance that they might be assured a roof over their head. He went to University of Buckingham with the balance of his savings and some contributions from charitable organisations. He was called to the Bar and was admitted to the Roll of Advocates and Solicitors of the High Court of Malaya on 28 September 1985.

[73] His suspension from practice in 1988 and his striking off from the Roll would be an indelible blot in his career, no doubt achieved thus far through much sweat and toil. It is even more painfully etched into his memory when such a fall from grace had come so quickly after much sweat and sacrifice to fulfil a dream of being a member of an honourable profession.

[74] He had expressed his remorse and regret and showed fruits of repentance as set out in paras 26–35 of his affidavit in support of his restoration.

[75] We are satisfied that he had made restitution for his failure to pay the debt of RM16,000 to his client which was the subject matter of the complaint against him for which he was struck off the Roll. He had exhibited as exh K4 in his affidavit in support a letter written on 7 November 2017 by his law accounts clerk one B Sartha, who to the best of his recollection wrote as follows:

> Re: Puan Hasmah Bte Mohamed and her son, Said bin Abu Bakar
>
> During the material time I was the account clerk in the employment of the firm Messrs B Krishna & Partners.
>
> From my recollection and to the best of my knowledge I can confirm that money's were paid and received by the Puan Hamsiah Bte Mohamed and her son Said bin Abu Bakar.
>
> I particularly remember the son Said bin Abu Bakar always accompanied the mother during their visit to our firm. After the firm closed down the persons above continued to receive the moneys.

> As the documents relating to this case is no longer in my position (sic), I am unable to confirm the actual amount paid although it is within my knowledge that after sometime the persons did not come to see me. I therefore assumed that they had received full payment.

[76] To the best of his recollection the respondent said that he had settled the debt of RM16,000 to his client though he does not have the full documents with him other than the relevant letters exhibited with the various cheques asking for an instalment of RM1,000 per month commencing 5 October 1990 in his letter to his client dated 30 August 1990 at p 107.

[77] We are inclined to believe that the client would in all probability have been paid in full as otherwise there are no good reasons why she and her son, the complainant, absented themselves from the tribunal and the DC's hearings. In his letter of complaint to the Advocates and Solicitors Disciplinary Board dated 19 March 1997 the complainant had stated categorically at p 98 of the RA(C) that they were prepared to come and give further evidence and both the office and house phone numbers were provided. The complainant had signed off the letter of complaint with his address at Jabatan Perkhidmatan Bandar, Majlis Perbandaran, Klang.

[78] Whilst the complaint was dated 19 March 1997, the notice informing the complainant and the respondent of the hearing before the tribunal was dated 26 May 2003 and the hearing was scheduled on 12 June 2003; some five years later. It was noted at p 131 of the RA(C) that the notice of hearing dated 26 May 2003 was sent by AR Registered Post and Certificate of Posting. The copy sent by AR Registered Post was returned unclaimed. The respondent by then had moved to Singapore.

[79] The DC set up was similarly faced with the unenviable task of investigating the complaint in the absence of the complainant and the client as well as the respondent. The DC in its report stated that notice of hearing was sent to the complainant and the respondent by AR Registered post notifying them of the hearing on 12 November 2003 and the hearing was adjourned to 12 December 2003. Both the complainant and the respondent were also absent. The DC in its report and recommendation to the DB dated 9 August 2004 stated as follows at pp 132–133 of RR encl 3:

> ... The Record of Complaint was before the Committee. However the Committee agreed unanimously that it was difficult to make a finding of fact and make a recommendation in the absence of the Complainant and the Respondent.
>
> Recommendation
>
> The Committee unanimously decided the Complaint be dismissed.

[80] The respondent said that he had tried to contact the client at the last known address but to no avail. Most people would not have kept records of payments for some 20 years, taking the date of complaint being the relevant date. We are satisfied that the absence of the complainant and his mother, the client, at both the tribunal and the DC hearings, would in all probabilities suggest that the payment of the amount owing said to be RM16,000 would have been made.

Whether the objections raised by the Bar Council are of such grave concerns as to bar his application for restoration to the Roll

[81] The Bar Council is justifiably concerned that the respondent as an applicant for restoration to the Roll must satisfy the court that he has been fully rehabilitated and that he is not likely to revert to his previous wrongful ways. See the case of *Kalpanath Singh s/o Ram Raj Singh v Law Society of Singapore* [2009] 4 SLR 1018. After all, 'An errant advocate and solicitor, who is not fully rehabilitated, continues to pose a threat to society and will cast a pall of doubt over the integrity and reputation of the legal profession'.

[82] Section 107(3) of the LPA requires the Bar Council to prepare a report to assist the court in a hearing under s 107(1) as follows:

> (3) Notice of the motion shall be served on the Bar Council which shall be represented at the hearing of the motion and shall place before the Court a report which shall include copies of the record of any proceedings as the result of which the name of the advocate and solicitor was removed from, or struck off, the Roll, and *a statement of any facts which have occurred since the name of the advocate and solicitor was removed from, or struck off, the Roll* and which in the opinion of the Bar Council or any member of it are relevant to be considered or to be investigated in connection with the application. (Emphasis added.)

[83] Learned counsel for the Bar Council submitted that the relevant passage of time should not be from 4 December 1989 when the respondent was suspended from practice but rather from 15 February 2005 (the date of the striking off order). The High Court had given credit and consideration to the fact that 'his absence from the profession for 25 years since the suspension is sufficient punishment for him'. That, it was submitted on behalf of the Bar Council, was clearly erroneous and against public interest, drawing support from the dicta of the High Court in *Awtar Singh*'s case at para 17 as set out above.

[84] Here is a case where the complaint, the subject matter of the striking off, was made on 19 March 1997 and the striking off order only made on 15 February 2005. Surely the respondent should not be prejudiced by any lapse of time not attributable to him. Whether the respondent had nevertheless

A decided to cease practice because he could not sustain his practice any longer, the fact remains that after the suspension order, he no longer could practise law. A s 88A LPA suspension order must be because of one of the grounds stated from paras (a) to (e) of s 88A and since there is no evidence before the court as to which ground, from the context and circumstances surrounding the case, B one may surmise that it is probably under ground (c) in respect of a complaint concerning any dishonest act or acts committed by him in his capacity as an advocate and solicitor.

C **[85]** The fact remains that he had stayed away from practice due to the suspension order which he did not apply to set aside.

[86] There is nothing wrong for the High Court to have considered the lapse of some 25 years since his suspension or some 12 years since being struck off the D Roll. Even the shorter period of 12 years is significant a period for repentance to do its disciplining and purifying work in purging the respondent of any proclivity towards the perverse.

[87] We take note that in the Court of Appeal case of *Ahmad Rushdi* it was E held that five years from the date of striking off the Roll was insufficient time for the applicant there to be fully reformed and rehabilitated. That decisions was upheld by the Federal Court on 20 February 2018 (but unreported), according to research by learned counsel for the Bar Council.

F **[88]** Perhaps the anxiety of the Bar Council can be appreciated because there was a request from Interpol to the appellant on 13 May 1993, to investigate the respondent who was overseas then and who was said to have fled with his client's money of $300,000 to $400,000. In reply, the appellant informed them G that the respondent had been suspended and was believed to working as a lecturer in London.

[89] On 14 April 2003, the Polis Diraja Malaysia ('PDRM') wrote to the appellant to investigate on the respondent who was said to be involved in a H breach of trust matter pursuant to s 409 of the Penal Code and whose whereabouts was unknown. In reply, the appellant supplied the respondent's latest addresses in the appellant's records. See pp 162–3 of the RA(C).

[90] However the respondent had exhibited a letter from PDRM to the I Director General of Immigration dated 3 October 2012 confirming that the Commercial Crime Investigation Division of the Police Headquarters of South Klang had approved of the respondent leaving Malaysia since the case involving the respondent had been settled and that the respondent's name was being removed from the wanted list.

[91] The Bar Council said that the respondent was trivialising the matter but in the absence of a formal charge or complaint, there was nothing that the respondent is expected to do further. In any event these were matters that happened before the striking off the Roll and a formal charge or complaint could have been preferred against the respondent so that he could be given an opportunity to reply.

[92] Learned counsel for the Bar Council further submitted that the Federal Court in *Thavananthan*'s case failed to consider the interests of the public and legal profession and only relied on the appellant therein having served his time in prison and thus, he should not be punished further. He then went on to submit that as the respondent in the instant case was not convicted with any criminal charges, and did not serve any punishment anywhere and thus, he cannot be said to have been adequately punished and had redeemed himself.

[93] We must be forgiven for not being able to follow that line nor the logic of such a submission. Whilst we are familiar with that old adage that 'where sin abound, grace abound all the more', we are nevertheless not able to appreciate that merely because there was no criminal charge preferred against the respondent or a conviction secured and that he had not served a prison sentence, when perhaps he should have for what he had done, he had therefore not been punished enough to warrant his present application for restoration to the Roll!

[94] A criminal charge would of course be a more serious misconduct, what more with a conviction and hence a permanent criminal record. There are a multitude of factors to be considered before a criminal charge is preferred for a criminal breach of trust against a lawyer. There must be at least a criminal police report lodged and here we do not see evidence of any.

[95] Lodging a false police report is an offence under s 182 of the Penal Code and so the complainant would have to check the facts first before making such a serious accusation against a lawyer. At any rate a criminal prosecution could not be proceeded with without the complainant giving evidence for it is a basic element that the complainant must be prepared to be cross-examined by the accused.

[96] In the event that the amount dishonestly misappropriated had been paid the public prosecutor would have to consider if public interest would be served in a case, where in the complaint to the Disciplinary Board, the complainant and the client appeared not interested to pursue the matter further as shown by their absence at both the tribunal and the DC proceedings.

[97] Under such a scenario it would be difficult if not impossible to secure a criminal conviction for misappropriation of client's money.

[98] In *Thavananthan*'s case the applicant was charged and convicted for the offence of accepting corrupt money under s 4(a) of the Prevention of Corruption Act 1961 and was sentenced to three years imprisonment. He was released from Kajang prison on 20 March 1999. On 5 July 2005 the appellant filed a motion to be restored to the Roll under s 107 of the LPA.

[99] The Bar Council had objected to his application on the ground that the offence committed was a very serious one, what more when it was committed by the applicant when serving as a magistrate and that such an offence strikes at the very heart of the administration of justice. Nothing is more disturbing and deplorable when a magistrate that has to decide a case fairly and without fear and favour is found to be on the take for a bribe blinds the eyes of the wise and twists the words of the righteous.

[100] The Federal Court in *Thavananthan*'s case made a comparison with the case of *Public Prosecutor v Wong Kim Fatt* [1991] 3 CLJ 2188 where the said lawyer was charged and convicted for a criminal breach of trust under s 408 of the Penal Code and sentenced to one year imprisonment. After his conviction disciplinary action was taken against him by the Bar Council and he was struck off the Roll on 18 August 1984. After three years he applied for reinstatement to the Roll on 28 October 1987 and this was allowed.

[101] The Federal Court took into consideration that he had lost the 'prime' of his life and career since he was convicted when he was 28 years old and that he would have been 45 years of age at the point of appeal to the Federal Court from the High Court as the procedure then was under s 107(5) of the LPA. The Federal Court then set aside the order of the High Court that had earlier dismissed the said application and allowed the appeal by the appellant to be restored to the Roll.

[102] By all counts, the merits of this instant case are far more than that in *Thavananthan* as the period here is some 12 years from the date the respondent was struck off, there was only a complaint without the complainant or client present to pursue the complaint, the respondent did not appeal but accepted his lot thus saving the courts its precious time, there was no criminal charge preferred nor conviction handed down and much less a prison sentence served and the respondent is now 70 years old.

[103] The Bar Council also enumerated in its report that there is a total of 25 complaints against the respondent. Out of that, the status merely shows that eight were referred to Disciplinary Board whilst the rest of it were either 'Not Available', dismissed or withdrawn.

[104] The outcome of the eight that were referred to the DB were not disclosed except for one where the respondent was suspended from practice for two years from the date of the order dated 16 November 1996.

[105] However what is statutorily required and relevant in the report under s 107(3) of the LPA is with respect to 'any facts which have occurred *since the name of the advocate and solicitor was* removed from, or *struck off, the Roll* and which in the opinion of the Bar Council or any member of it are relevant to be considered or to be investigated in connection with the application'.

[106] All these complaints were from 1988 to 1992 and very significantly they were not with respect to facts which have occurred since the respondent was struck off the Roll in 2005.

[107] There was no evidence given of any Tribunal or DC's report against the respondent for the complaints except for the one stated at No 25 where the complainant was one Mohd Yusof bin Abdul Hamid and even then only the DB complaint number, the nature of the complaint and the status were given. The Bar Council was not able to furnish details on the majority of the complaints which were marked as 'NA'.

[108] The law requires that the respondent be furnished with the details of the complaint and be given an opportunity to answer the allegations made. If for some reason the complaints are not pursued further by the DB, then surely the respondent cannot be faulted after more than 25 years from the last complaint in 1992 to now being unable to reply to complaints which he was not aware of and for which the Bar Council itself cannot furnish information.

[109] The Bar Council in its report confirmed that the respondent had not been subjected to other complaints or acts unbecoming since the date he was struck off the Roll. See para 5(xii) of the Bar Council Report marked as exh CWK1 at pp 138–145 RA(C).

[110] Whilst the court is equally concerned and anxious with the Bar Council to note that in the year 2016 a total of 17 advocates and solicitors were struck off the Roll and that the number as at 25 October 2017 for the year 2017 was already 17, this is a case where the court must also have particular regard to 'fairness' to the applicant/respondent whilst not forgetting for a moment the need for 'fairness' to the profession, the court and the public as a whole.

[111] Without doubt an application of this nature must be treated with utmost seriousness and scrutinised with greater strictness for the applicant here had failed the client, tarnished the profession and undermined public trust.

[112] Where the punishment has run its course the applicant/respondent must be given a chance to redeem himself and to serve the public once again for not to allow him to do so would be to mete out a punishment disproportionate to the seriousness of his misconduct.

[113] The fact that the Bar Council keeps a permanent record in its website, available to all who would want to search the annals of history of practitioners at the Bar that had been suspended or struck off, would be a further protection for the public who might be less inclined to give the respondent a second chance after seeing him listed before in the hall of shame of the Bar Council.

[114] That is the continuing price that the respondent must pay for it is part of his past that he must live with.

[115] Where his financial standing and status is concerned he had obtained on 17 January 2013 from the Shah Alam High Court in MTSA 29–277–1993 in 29–2905–1997 an annulment of his bankruptcy order dated 22 March 1995 and 27 October 1999.

[116] We recall what was said in *Charan Jit Singh a/l Santokh Singh v Majlis Peguam Malaysia & Anor* [2013] 9 MLJ 400 when restoring an advocate and solicitor to the Roll under circumstances not very dissimilar to the present case:

> [25] The applicant has also shown repentance and penitence when he accepted his punishment for the last 13 years. There is no issue with regard to restitution. I do not also think that public confidence of the legal profession will be diminished by the restoration to the Roll of the applicant. I think that public interest will also be served by affording the applicant a second chance to serve society by utilizing his knowledge and experience. His disbarment will also serve him well. As opined by the senior pastor who filed a letter on behalf of the applicant and with whose sentiments I agree; 'only those who have suffered much will know the suffering of others'. In a somewhat similar vein is the statement in *Ex-parte FE Maddocks Cohen* (1956) 73 WN (NSW) 126; 'But the false steps of youth and early manhood are not always the final proof of defective character and unfitness. The presumption which, according to circumstances, they may appear to raise may surely be overcome by a subsequent blameless career'.

DECISION

[117] Taking into consideration and weighing all the relevant factors of the lapse of time since the suspension and striking off from the Roll and having

satisfied ourselves that the applicant/respondent has shown fruits of repentance consistent with his rehabilitation and that due restitution has in all probabilities been made, we were of the view that he should be given a second chance.

[118] Whilst many who had started at about the same time as the respondent in practice are now thinking of enjoying their retirement years, the respondent at 70 years of age, is only about to relive his life in the law.

[119] He should be given an opportunity to serve the public in the profession that he had striven hard to qualify for and now in the last lap of his life, he wants to return to and contribute.

[120] No doubt the years that the locusts have eaten would serve as a constant and painful reminder that the law is exacting and uncompromising where trust and honour is concerned and that if he were to redeem what he had lost he must be fully committed to finish well the remaining race left for him.

[121] We therefore had dismissed the appeal of the Bar Council against the decision of the High Court ordering restoration of the applicant/respondent to the Roll of Advocates and Solicitors of the High Court of Malaya. The decision of the High Court was thus affirmed.

[122] We made no order as to costs.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh